No. 46796-8-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

VICKIE ELLIOTT, an individual,

Appellant,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS, an agency of the State of Washington,

Respondent.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION.

In reviewing DOC's Response, one thing is clear: an affirmance of the trial court's improper dismissal would require this Court to view Ms. Elliot's allegations, evidence and reasonable inferences in the light most favorable to DOC. However, it is "axiomatic" that when reviewing a summary judgment, this Court must accept Ms. Elliott's evidence as true, and must draw all of the reasonable inferences from those facts in *her* favor. CR 56(c); LaCoursiere v. Camwest Development, Inc., 181 Wn.2d 734, 740 (2014); accord Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 623 (2002) (holding that a court reviewing a summary judgment has "no authority to weigh evidence or testimonial credibility.")

Affirming the trial court would also require this Court to ignore the well-established principle that in considering the evidence and inferences of discriminatory hostility, this Court must do so from the perspective of a reasonable African-American, rather than from the perspective of a Caucasian person. Failing to do so not only cuts against the well-established principles applicable to summary judgment review in employment discrimination cases, it also has the devastating effect of permitting forms of discrimination "that are real and hurtful" to be "overlooked" because they are "considered solely from the perspective of an adjudicator belonging to a different group than the plaintiff." McGinest v. GTE Srvc. Corp., 360 F.3d 1103, 1116 (9th Cir. 2004).

Despite DOC's arguments to the contrary, the trial court's error has undermined (and substantially narrowed) the important protections of the WLAD. As explained in detail below, when viewed through the correct analytic lens, there is no doubt that Ms. Elliot's evidence and the reasonable inferences flowing from it warrant a reversal of the trial court's improper dismissal. Ms. Elliot deserves her day in court, before a jury of her peers.

II. POINTS AND AUTHORITIES.

A. Debra Smith's Retaliation is an Act of DOC as the "Employer."

The Department of Corrections ("DOC") contends that Vickie Elliott's retaliation claim was properly dismissed because, according to DOC, Ms. Elliott cannot prove that DOC, as her "employer," engaged in any act of retaliation. Resp. Br. at 17. However, DOC's position ignores the statutory definition of "employer" in the Washington Law Against Discrimination ("WLAD"). It also impermissibly narrows the protections provided by the WLAD and is contrary to the interpretation of the analogous Title VII anti-retaliation provisions.

The WLAD defines the term "employer" to include "*any* person acting in the interest of an employer, directly or indirectly[.]" RCW 49.60.040(11) (emphasis added). That definition simply codifies the common-law doctrine of agency liability. Brown v. Scott Paper Worldwide

Co., 143 Wn.2d 349, 360 n. 3 (2001) (an employer is liable under the WALD on "the theory of *respondeat superior* liability . . . when any of its employees, who are acting directly or indirectly in its interest, engage in discrimination."). Plainly, when Debra Smith was working in the Larch kitchen, she was "acting in the interest" of DOC. As such, her retaliatory tripping of Vickie Elliott is a retaliatory act of DOC as the "employer."

The Washington Legislature has directed that the WLAD "shall be construed liberally" to accomplish its purpose, and narrowing constructions are to be avoided. RCW 49.60.020; Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 848 (2013). This Court may not modify the statutory definition of "employer" or read into it a limitation that the Legislature did not include. Rushing v. ALCOA, Inc., 125 Wn. App. 837, 840 (2005). DOC's proposed construction of the term "employer" would do both, impermissibly narrowing the WLAD's protections.

Finally, federal courts interpreting Title VII's anti-retaliation provisions recognize that co-worker retaliation *is* retaliation by an "employer." E.g., Fielder v. UAL Corp., 218 F.3d 973, 984-85 (9th Cir. 2000), vacated on other grounds, 536 U.S. 919 (2002). The Fielder court reasoned that doing otherwise would permit employer retaliation "at will," so long as it did not "constitute an ultimate employment decision or rise to the level of a constructive discharge." Id. at 984. The majority of Circuits hold that Title VII protects against co-worker retaliation that is "known to but not

restrained by the employer." Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 345-46 (6th Cir. 2008) (and cases cited therein). Consistent with the WLAD definition of "employer," liability for co-worker retaliation is predicated on "basic agency principles." Moore v. City of Philadelphia, 461 F.3d 331, 349. (3rd Cir. 2006). Federal courts generally hold an employer liable for co-worker retaliation where the employer's response "manifests indifference or unreasonableness in light of the facts that the employer knew or should have known." Hawkins, 517 F.3d at 347; accord, Moore, 461 F.3d at 349.

Here, there is a wealth of evidence from which a reasonable juror could conclude that DOC knew or should have known that Ms. Smith posed a retaliatory threat to Ms. Elliott and that it acted unreasonably (or with indifference) in light of those known circumstances. First, DOC had a substantiated workplace violence finding against Ms. Smith for her mistreatment of Ms. Elliott, misconduct that DOC noted was not only a "violent and threatening action" but also "completely intolerable," particularly in a "prison setting where staff depends so heavily on their coworkers for safety." CP 517 & 519, ¶ 1. DOC had placed Ms. Smith on a six-week-long administrative leave while it decided what sort of discipline to impose. CP 31, ¶ 17. During the course of that leave, DOC learned that Debra Smith was very angry about Ms. Elliott's discrimination complaint and that she blamed Ms. Elliott for same. CP 344 & 509-512. It then

notified Ms. Smith that it was imposing a ten-day unpaid suspension against her on September 28, 2010, the day before she was to return to Larch from that leave, reigniting the anger that Ms. Smith felt about that discipline. CP 515. DOC knew that Ms. Smith herself did not want to work with Ms. Elliott because she felt it placed both women "in jeopardy." CP 347-348. And DOC had in hand a lawfully obtained Restraining Order from Ms. Elliott. CP 312-313.

Notwithstanding these facts, DOC required the two women to work in close proximity to each other, despite its proven ability to modify shift schedules in order to accommodate institutional needs – such as protecting its employees – and the availability of other employees to cover the shift. CP 537; 561-563; 574-577 & 582. On the very first day that Ms. Smith was back in the kitchen, she assaulted Ms. Elliott, tripping her as she walked through the Larch kitchen and sending her to the emergency room. CP 317-319. Finally, even after that third assault, when Ms. Elliott requested to return to work but not be forced to work with Ms. Smith, DOC refused. CP 322-323.[1] A reasonable juror could conclude that DOC knew or should have known of the threat posed by Ms. Smith and her final assault,

[1] In an apparent effort to avoid the consequences of its failure to take any action – investigatory or otherwise – against Debra Smith for the final tripping incident, DOC repeatedly claims, without evidentiary support, that Ms. Elliott somehow failed to give it the opportunity to investigate that tripping or refused to cooperate with its investigation. On the contrary, the evidence in the record on that point shows that Ms. Elliott not only notified DOC about the details of that final assault and the resulting constructive discharge, but that she filed a tort claim in order to have the State initiate an investigation of that incident. CP 53-55.

but that it acted unreasonably or indifferently in the face of that threat and in response to the assault. Ms. Elliott's retaliation claim should go to a jury.

B. The Constructive Discharge Claim Should Go to a Jury.

DOC argues that Ms. Elliott's constructive discharge claim was properly dismissed because she did not "stand pat and fight," but instead "voluntarily" quit. Resp. Br. at 37-38 (citing Molsness v. City of Walla Walla, 84 Wn. App. 393, 398 (1996) & Travis v. Tacoma Public Sch. Dist., 120 Wn. App. 542, 552 (2004)). DOC's position is contrary to Washington law governing constructive discharge claims, and ignores the fact that Ms. Elliott's forced resignation – after a third kicking incident and further harassment – was the final straw in a pattern and practice of intolerable working conditions that DOC knew about but deliberately failed to take reasonable measures to prevent. Under the appropriate legal standard, this evidence is sufficient to support a constructive discharge claim.

A constructive discharge occurs where an employer deliberately makes an employee's working conditions intolerable, thereby forcing the employee to resign. Micone v. Steilacoom Civil Serv. Comm'n, 44 Wn. App. 636, 643, rev. den., 107 Wn.2d 1010 (1986). Washington courts apply an objective standard for determining when a constructive discharge exists: it exists when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have

felt compelled to resign." Id. Whether working conditions are "intolerable" is generally a jury question. Sneed v. Barna, 80 Wn. App. 843, 849, rev. den., 129 Wn.2d 1023 (1996).

The employer's subjective intent is irrelevant in establishing a constructive discharge; the pertinent question in determining whether the employer acted "deliberately" is whether the employer engaged in an intentional act which had the *effect* of making the employee's working conditions intolerable. Bulaich v. AT & T Info. Sys., 113 Wn.2d 254, 261 (1989); accord, Lee v. Rite Aid Corp., 917 F.Supp.2d 1168 (E.D. Wash. 2013) (applying Washington law). Courts look for evidence of "either 'aggravating circumstances' or a 'continuous pattern of discriminatory treatment' to support a constructive discharge claim." Id. at 850; see also, Haubry v. Snow, 106 Wn. App. 666, 677 (2001).

The employer is responsible for a discriminatory environment created by a co-worker where the employer: "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." Glasgow v. Georgia-Pacific Corp., 103 Wn.2d 401, 407 (1985). This may be established by proving complaints were made to the employer and that the employer failed to take remedial action reasonably calculated to end the harassment. Id. In analyzing a constructive discharge claim, this Court must consider the

totality of the circumstances "to determine the ability of the employee to exercise [her] free choice." Micone, 44 Wn. App. at 642.

This court, therefore, must examine – in a light most favorable to Ms. Elliott – the history of Ms. Elliott's interaction with Debra Smith, Ms. Elliott's complaints to DOC, and DOC's failure to take adequate measures in order to determine whether the evidence is sufficient to support a constructive discharge claim. The trial court erred in failing to conduct this analysis.

DOC's reliance on Molsness and Travis in arguing that Ms. Elliott failed to "stand pat and fight" is misplaced. In Molsness, the plaintiff resigned to avoid threatened termination for cause and presented no evidence that good cause for his termination could not be substantiated. Under those circumstances, the plaintiff's resignation was voluntary. 84 Wn. App. at 398. Similarly, in Travis, the plaintiff resigned, but later claimed the resignation was coerced. The Travis plaintiff received unsatisfactory performance evaluations, which prompted the employer to notify the plaintiff that it would not renew his contract. The plaintiff also claimed that he was forced to resign because the employer failed to accommodate his disability. However, after the plaintiff first advised the employer about a possible need for an accommodation, he refused to respond to four requests for information. Under those circumstances, the

Travis plaintiff waived any claim for wrongful termination. 120 Wn. App. at 552.

In stark contrast here, Ms. Elliott was subjected to a repeated pattern of racially discriminatory and violent conduct by her coworker, which DOC knew about but failed to take reasonable steps to correct or prevent, leading only to further incidents of harassment and violence. That pattern included the following:

- In late 2009 while supervising inmates in the kitchen, Ms. Elliott was kicked by her coworker, Debra Smith. CP 3-4, 155-156, 193, 230, 283-285, 291, 358-359, 425, 430. Ms. Elliott reported the incident to DOC. Id.

- Ms. Elliot explained to her supervisor, as she had explained to Ms. Smith, what the kicking gesture meant to her – that as an African-American, being kicked was the lowest thing that could be done to a person and that it went back to the days of slavery when African-American people were treated worse than dogs. CP 157, 168-69, 230, 288-89, 631 & 670.

- The incident occurred in front of inmates Ms. Elliott was supervising, and it "tore down" everything she "had built" in her work environment with those inmates, making her feel vulnerable and in an unsafe environment. CP 158, 163, 197-198, 230-231, 288-290 & 359.

- Despite telling Ms. Smith how offensive being kicked was and the reason why, in March 2010 Ms. Smith became aggressive once again in the kitchen, told Ms. Elliot to "*Git* back on the other side of the

kitchen," and attempted to kick her a second time. CP 72, 88, 155, 166, 231-232, 292-293, 495, 600.

- Ms. Elliott reported the two incidents to DOC in March 2010, and filed an Internal Discrimination Complaint and Workplace Violence Report. CP 69-71, 232, 294-295, 428-429, 664-665, 667-669.

- Ms. Elliott explained that the incident made her feel unsafe, discriminated against, and that she was tired of the violent and discriminatory nature of the facility. CP 109, 146, 164, 232, 273-281, 298-299.

- Ms. Elliott told DOC that by kicking at her a second time, after she had explained the racial significance of the gesture, Ms. Smith was intentionally acting in a racially discriminatory manner. CP 232, 670.

- Within days of reporting the incidents, on March 18, 2010, Ms. Smith sent Ms. Elliott a racist, mocking email entitled "ASS KICKIN' BY A REAL VETERAN." Ms. Smith specifically directed Ms. Elliott to read the portion of the email that said "If you ever see someone singing the national anthem *IN SPANISH – KICK THEIR ASS*." CP 73-87, 175-176, 232-233, 301-303, 359, 406-420, 432-446.

- Ms. Elliott reported the racist email to DOC, felt threatened, and continuously asked for a shift change in order to avoid Ms. Smith. CP 30, 233, 304-305, 307.

- Shortly after the second kicking incident Ms. Elliot was subjected to additional ridicule by Ms. Smith and two other DOC employees. Ms. Elliott reported this hostility to DOC. CP 670.

- Superintendent Vernell promised that DOC would investigate the matter, but DOC delayed even beginning the investigation for over two months and failed to conclude it until July 20, 2010, more than five months after the second incident. CP 30, 115, 172-173, 233.

- On September 22, 2010, DOC informed Ms. Elliot that Ms. Smith was returning to the kitchen. CP 109. Ms. Elliott objected and asked to be placed on a different shift, but DOC refused. CP 234, 309.

- Unsatisfied, Ms. Elliott expressed concern for her safety to Superintendent Vernell and again requested that her shift be changed to avoid contact with Ms. Smith. CP 33, 51, 178-179, 233, 537.

- Superintendent Vernell refused, despite the fact that the Collective Bargaining Agreement permitted reassignment. CP 33, 118, 233, 537, 561-564, 575-576. Ms. Elliott pointed out this very fact to Superintendent Vernell and again expressed fear for her safety and security. CP 34, 51, 233, 273, 537.

- In light of DOC's refusal to take reasonable steps to avoid a future assault, on September 28, 2010, Ms. Elliott obtained a Temporary Restraining Order against Ms. Smith and served her the first day they were scheduled to work together. CP 34, 168, 181, 233-234, 312, 601-605.

- After providing a copy of the TRO to DOC, DOC told Ms. Elliott that she and Ms. Smith would *still* have to work together because the TRO dealt with a "personal issue," not a DOC matter. CP 34, 177, 182, 188, 313-314.

- Given no other choice, Ms. Elliott returned to the kitchen, where, on the first day that Ms. Smith was back in the kitchen, she tripped

Ms. Elliott, sending her to the emergency room. CP 35, 184-185, 234, 319-320, 609.

- Following this third incident, on October 8, 2010, Ms. Elliott secured a longer term temporary restraining order against Ms. Smith, effective for one year, and again requested a shift change for her protection. CP 330. DOC *again* refused the shift change request. CP 35, 184-185, 234, 319-320, 322-23 & 609.

- Finally, given no other choice, Ms. Elliott was forced to resign due to DOC's failure to adequately protect her from a pattern of harassment, discrimination, and violence that prevented her from doing her job. CP 55, 147, 322-323, 330, 360, 566.

Thus, unlike the plaintiffs in Molsness and Travis, Ms. Elliott did not voluntarily resign. She had no choice. DOC refused to take any, much less reasonable, steps to prevent a third assault on Ms. Elliott, even after DOC was provided with a TRO. And even *after* that third assault, when Ms. Elliott agreed to come back to work, but asked to be placed on an alternate shift in order to minimize her contact with Ms. Smith, DOC still refused, despite its ability to do so and the availability of alternate workers to cover the shift change. In addition to that evidence, there is evidence that handling personnel disputes in this manner (by forcing the two employees to work together) was a *de facto* DOC policy with the unstated purpose of forcing one or the other employee to resign. CP 595 & 607.

It is difficult to imagine what more Ms. Elliott could have done under these circumstances to "fight" for her position. Instead of acting to protect Ms. Elliott, DOC intentionally required the two women to work together after numerous assaults, which clearly had the *effect* of making Ms. Elliott's working conditions intolerable. The trial court erred in dismissing Ms. Elliott's constructive discharge claim. Korslund v. Dyncorp Tri-Cities Srvcs., Inc., 121 Wn. App. 295, 318 (2004), rev'd in part on other grounds, 156 Wn.2d 168 (2005) (holding that nonthreatening reassignments and criticism were sufficiently "aggravated circumstances" to create jury question on constructive discharge claim); Hotchkiss v. C.S.K. Auto, Inc., 918 F.Supp. 2d 1108, 1118-19 (E.D. Wash. 2013) (holding that four threatening comments over the span of two months, with no physical acts, and the employer's failure to remedy same, created a jury question on constructive discharge claim).

C. Ms. Elliott's Hostile Work Environment Claim Should Go to a Jury.

1. The evidence supports the conclusion that Debra Smith's harassment was racially motivated.

Ignoring the wealth of evidence to the contrary, DOC continues to insist that Ms. Elliott "has offered *no evidence* to establish that Smith kicked Elliott because of Elliott's race." Resp. Br. at 19-20 (italics added). In support of its position, DOC invites this Court to make the same error that

the trial court did; namely, to view the evidence in the light most favorable to DOC and to ignore an African-American perspective.

For example, DOC contends that Ms. Smith's admission that she understood the racial implications of her kicking is "not an admission that she was motivated by racial animosity." Resp. Br. at 20-21. That is an inference in DOC's favor. Drawing the inference in Ms. Elliott's favor, the only conclusion that this Court may reach is that because Ms. Smith understood the racial implications of her gesture, she intended the gesture to be racial. That conclusion is further supported by the fact that Ms. Smith not only kicked Ms. Elliott a second time, but after being told by Ms. Elliott that the gesture had racial significance because it was analogous to being treated like a dog, Ms. Smith amplified the intensity of the gesture by also speaking to Ms. Elliott as if she were a dog, using the term "Git!" as she attempted to kick Ms. Elliott CP 72, 76, 88, 155, 166, 231-232, 292-293, 495, 600.

While possibly an ambiguous gesture, the Washington Courts recognize that in the face of such ambiguity, summary judgment is inappropriate. That principle was recently exemplified by Loeffelholz v. University of Washington, 175 Wn.2d 264 (2012), where the Washington Supreme Court held that a single comment, when understood in context, could support a hostile work environment claim. The comment in Loeffelholz was not directed solely at the plaintiff, nor did it evidence any overt bias; rather, it was made to a group of people before the harasser's

deployment to Iraq when he said that he was "going to come back a very angry man." Id. at 269 & 275-276. As the Washington Supreme Court recognized, viewing the comment in the context and history between the plaintiff and her harasser supported the reasonable conclusion that the harasser "intended it to have special meaning for [the plaintiff]." Id. Likewise here, in light of Debra Smith's acknowledgment of the racial implications of her gesture and Ms. Elliott's explanation of its history, a reasonable juror could conclude that Ms. Smith intended her kick to have "special meaning" for Ms. Elliott as a racially motivated put-down.

Additional evidence supports this conclusion, particularly the overtly racist "ASS KICKIN'" email that Ms. Smith sent to Ms. Elliott only days after the second kicking incident. CP 73-87, 175-176. DOC seeks to hide that evidence, claiming that because it was sent off-hours to Ms. Elliott's home computer, it cannot be considered by this Court.[2] Resp. Br. at 24.

On the contrary, courts regularly consider evidence of non-workplace conduct in order to "determine the severity and pervasiveness of the hostility in the workplace" and to "establish that the conduct was motivated" by protected-class status. Crowle v. L.L. Bean Inc., 303 F.3d 387, 409-10 (1st Cir. 2002). Harassment need not take place within the

[2] The case that DOC cites in support of that proposition, Clarke v. State Attorney General Office, 133 Wn. App. 767 (2006), did not decide whether out-of-work activities can support a hostile work environment. Rather Clarke held that the plaintiff could not support her hostile work environment claim with an administrative leave assignment pending a misconduct investigation, noting in dicta that the plaintiff "could not have been subjected to a hostile work environment if she was not at work." 133 Wn. App. at 786.

workplace to be actionable; it need only have consequences in the workplace. Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008).

The "ASS KICKIN'" email is unequivocal evidence that Ms. Smith targeted Ms. Elliott on account of her race, sending the message that Ms. Elliott was not a "full and equal member of the workplace" and that she could be treated accordingly. McGinest, 360 F.3d at 1103. As intended, it made Ms. Elliott more fearful for her safety at Larch. CP 340, lns. 17-20. Based on the foregoing authorities, in light of the remedial nature of the WLAD, this Court (and the jury) may consider the "ASS-KICKIN'" email as part of Ms. Smith's harassment. See also, Mercer Island School Dist. v. Office of Superintendent of Public Instruction, ___ Wn. App. ___, 347 P.3d 924, 945-46 (2015) (considering comment that African-American student "crossed the border from Mexico" as a component of that student's racially hostile educational environment claim).

Finally, DOC takes exception to what it calls an "apple does not fall far from the tree" argument based on the evidence of Ms. Smith's upbringing. Resp. Br. at 20. However, the fact that Debra Smith was raised by an openly racist father who routinely used the term "nigger" and who expressed his opinion that African-Americans "just all need to be shot," CP

335-77, is only one piece of the puzzle.[3] That evidence must be understood in light of the subsequent racist email and the testimony of other DOC employees that Ms. Smith was known to use racist jokes and to have joked about the kicking incidents. CP 504-505 & 581. Based on this evidence, a reasonable juror could conclude that kicking Ms. Elliott was a reflection of Ms. Smith's deeply-rooted racism.

As set forth above, Ms. Elliott has produced sufficient evidence to permit a reasonable juror to conclude that Ms. Smith's actions were racially motivated. McGinest, 360 F.3d at 1103; see also, Fisher v. Tacoma Sch. Dist. No. 10, 53 Wn. App. 591, 594 & n.4, rev. den., 112 Wn.2d 1027 (1989) (trial court recognized that a single note stating "discrimination is hard to prove" supported the conclusion that actions were discriminatory). Accordingly, this issue should be decided by a jury.

2. Ample evidence supports the conclusion that Ms. Elliott's work environment was objectively hostile.

As explained above, there is sufficient evidence for a jury to conclude that DOC subjected Ms. Elliott to a constructive discharge. The courts uniformly hold that constructive discharge claims are subject to a "'higher standard' than a hostile-work-environment claim." E.E.O.C. v. Global Horizons, Inc., 23 F.Supp.3d 1301, 1315-1316 (E.D. Wash. 2014)

[3] Ms. Elliott does not intend to imply that individuals cannot overcome a racist upbringing. However, the other evidence in the record noted above demonstrates that Debra Smith has not done so, despite her protestations to the contrary.

(applying Washington law). In light of the higher standard required to support her constructive discharge claim, it necessarily follows that the evidence is sufficient to support her hostile work environment claim. Glasgow, 103 Wn.2d at 406-407.

The DOC also argues that because Ms. Smith's actions lack the kind of "obvious racial animosity" exhibited by other forms of discrimination, they are not severe or serious enough to create a hostile work environment. Resp. Br. at 28. Again, DOC invites this court to err, as did the trial court, by ignoring the perspective of a reasonable African American employee. As one court has recognized, it is "uncontroversial to observe" that even subtle messages of racism injure, and that "if accepted blindly" they "maintain or promote the invidious inequalities that exist in our world today." Monteiro v. Tempe Union High School Dist., 158 F.3d 1022, 1031 (9th Cir. 1998). Accepting DOC's argument that Debra Smith's discrimination was somehow less severe because it was less "obvious" simply ignores the impact of such discrimination on African-American employees, contrary to the fundamental goal of the WLAD.

While the antidiscrimination laws have "educated" would-be violators such that "extreme manifestations of discrimination" are rare, discrimination nonetheless "continues to pollute the social and economic mainstream of American life" and is often "simply masked in more subtle forms." Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1081-82 (3rd

Cir. 1996). As the Aman Court noted, it has "become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is, in reality, discriminatory behavior." Id. at 1082. However, while most defendants have learned not to leave "smoking gun" evidence, the "impermissible impact" of even subtle discrimination remains, and the antidiscrimination laws' prohibition against it remains unchanged. Id. Simply put, the antidiscrimination laws "tolerate no racial discrimination, subtle or otherwise." McDonald Douglas Corp. v. Kreen, 411 U.S. 792, 801 (1973).

DOC's argument must be rejected and Ms. Smith's discriminatory harassment must be recognized for what it is. It is no less harmful to Ms. Elliott than being called a "nigger" or having a noose hung in her workplace. Confirming that fact is the testimony of numerous African-American DOC employees – including its Deputy Director, Earl Wright – who understood Ms. Smith's harassment to be "very disrespectful," "derogatory," and reminiscent of being "treated like a slave." CP 500-503, 564-565, 630-633. It is thus a jury question whether a reasonable African-American person, standing in Ms. Elliott's shoes, would have found the work environment at Larch polluted with discriminatory hostility. McGinest, 360 F.3d at 1116; Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1511 (1989).

3. The evidence of extensive racial hostility at Larch puts Ms. Elliott's hostile work environment claim in its proper context and allows the jury to assess whether DOC acted reasonably.

DOC contends that Vickie Elliott should be prohibited from relying on evidence of racial hostility that occurred before the incidents involving Debra Smith. Resp. Br. at 28-29. According to DOC, those incidents are *res judicata* and cannot be considered because they were resolved by way of an earlier settlement. Id. DOC also contends that such evidence, including evidence of discrimination suffered by other DOC employees,[4] cannot be considered in assessing whether its response to the racial hostility at Larch was reasonable. Resp. Br. at 30-31.

To be clear, Ms. Elliott does not contend that the instances of racial harassment that were the subject of the previous settlement agreement are actionable in this claim. Rather, they are part of the totality of circumstances that a jury should be permitted to consider in assessing whether the incidents involving Debra Smith created a hostile work environment. Loeffelholz, 175 Wn.2d at 73-75. Ms. Elliott is not relitigating those claims; rather the instances of harassment and discrimination suffered by her and other African-American employees at

[4] DOC raises a number of objections to that evidence by way of Supplemental Clerk's Papers. Resp. Br. at 16, n. 4. As explained in the attached Appendix A, however, those objections are without merit, and the Court may consider the offered evidence.

Larch is evidence that permits the finder of fact to fully assess the impact of Ms. Smith's racial harassment and DOC's failure to adequately respond.

As Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009) and Theno v. Tonganoxi Unified School Dist. No. 464, 377 F.Supp.2d 952 (D. Kan. 2005) show, DOC's failure to address systemic discrimination may be considered as evidence of its failure to take reasonable steps to correct a racially hostile work environment.[5] Here, as in Patterson and Theno, DOC took disciplinary action against certain individual harassers, yet the pattern of discrimination directed at Ms. Elliott persisted. As in Theno and Patterson, DOC failed to take more than a piecemeal approach to correcting the situation. Thus, a reasonable juror could conclude that, while prior corrective measures directed at the individuals may have been reasonable responses to those individual instances of harassment, they failed to dissuade Ms. Smith from her harassment of Vickie Elliott and DOC failed to take adequate measures at an institutional level to ensure that such harassment did not recur. Under Patterson and Theno, a juror could thus conclude that DOC's remedial measures were inadequate.

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[5] DOC attempts to limit the reach of Patterson and Theno because those cases analyze claims under Title IX. Resp. Br. at 31, n. 10. However, the Title IX standard is a higher standard of liability, requiring a plaintiff to prove that the defendant was "deliberately indifferent" to severe and pervasive discrimination. Patterson, 551 F.3d at 445. That is a far higher standard than the basic negligence standard under the WLAD for imposing liability on DOC. Thus, the Theno and Patterson decisions are instructive here.

4. There was ample evidence that DOC failed to take reasonable corrective measures.

DOC insists that it took appropriate action in response to Ms. Elliott's reports of discrimination. It further insists that the investigation adequately dealt with the discriminatory component of Debra Smith's actions. However, a review of the report of investigation plainly shows that the discriminatory aspects of Ms. Smith's actions were entirely erased. While the investigation concludes that the two kicking events occurred (because those facts were undisputed) there is no discussion, analysis, finding or conclusion about whether Debra Smith's actions were discriminatory. CP 422-425. The investigation does not even address the overtly discriminatory email that Ms. Smith sent to Ms. Elliott, instead dismissing it as "a coincidence." CP 425. And it simply ignored the fact that Ms. Elliott had explained to Ms. Smith the racial dimensions of the kick. CP 232 & 670. The investigation was nothing more than a conclusion about Ms. Elliott's workplace violence complaint.

As DOC's Labor Relations Manager Todd Dowler testified, where two separate complaints are made arising out of the same incident, one an internal discrimination complaint and the other a work place violence complaint, *both* complaints must be investigated and concluded. CP 470-71. The reason is simple: An act of workplace violence motivated by racial hostility justifies a more severe sanction than one that is not so

motivated. CP 482 lines 20-24 & CP 471-472. As a direct result of DOC's failure to include any finding on the discrimination issue, Mr. Dowler was not even aware that Ms. Elliott's complaint against Ms. Smith was a *discrimination* complaint. CP 482 at lines 13-19. Such a finding would have made a difference in Mr. Dowler's recommendation because it would have justified Superintendent Vernell's initial recommendation to terminate Ms. Smith rather than the downgrade to a suspension that Mr. Dowler ultimately recommended. CP 482, lines 20-24 & CP 483 lines 2-18.

In light of these facts, DOC cannot reasonably contend that its investigation adequately addressed Debra Smith's racial discrimination. As a direct result of DOC's failure to consider the discriminatory component of that complaint, Ms. Smith was returned to the Larch kitchen, where she engaged in additional acts of discrimination (and retaliation) against Ms. Elliott. DOC's reliance on Fisher is misplaced. The Fisher Court ruled that because the defendant had not received a critical piece of evidence establishing the racial component of the harassment, it could not have been on notice of racial harassment and thus could not be liable for failing to properly address a racially hostile work environment. 53 Wn. App. at 597-98.

Here, in stark contrast, the DOC initially acknowledged the racial component of Ms. Elliott's complaint, CP 298-299 & 669, ¶ 2, and there

was explicit evidence of racial bias that DOC simply chose to ignore, writing it off as a mere "coincidence." Despite that initial acknowledgement and the explicit evidence of racial bias, DOC erased the racial component of Ms. Elliott's complaint and as a result returned Ms. Smith to the Larch kitchen where she again victimized Ms. Elliott. That is evidence from which a juror could conclude that DOC's remedial measures were inadequate. Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 793 & 795-96 (2004).

DOC also attempts to avoid the effect of its failure to timely investigate Ms. Elliott's complaints or take appropriate remedial measures pending the conclusion of that investigation. Relying on Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001), DOC argues that it was "not required to separate" Ms. Elliott and Ms. Smith pending the conclusion of the investigation. Resp. Br. at 34. While Swenson may not dictate that DOC separate Ms. Smith and Ms. Elliott while the investigation was ongoing, that decision makes clear that DOC was required to "try to eliminate contact" between Ms. Smith and Ms. Elliott that was not "strictly business related" and that, if they must have such contact during the pending investigation, DOC was required to "take reasonable steps to expedite the investigation." 271 F.3d at 1193, n. 8.

Here, DOC made no effort to limit contact between Ms. Smith and Ms. Elliott pending the conclusion of that investigation. As a result, Ms.

Elliott was subjected to the "ASS KICKIN'" email, she was forced to endure subsequent humiliation when she was taunted by a group of DOC employees including Debra Smith, CP 46, and she was in fear on a daily basis because of the way Ms. Smith had treated her in front of inmates. CP 307. Additionally, there is no evidence that DOC did anything to expedite the investigation – it was not concluded for more than five months after Ms. Elliott's initial reports.

DOC argues that its delay in conducting the investigation of Ms. Elliott's reports was not unreasonable, going so far as to blame Ms. Elliott for that delay. Resp. Br. at 33-34. The facts prove otherwise. Ms. Elliott reported the second kicking incident to DOC on March 10, 2010, but the investigation did not begin until May 20, 2010. Compare CP 29, ¶ 10 with CP 63. Ms. Elliott was not even contacted by the investigator for over a month, a delay for which DOC offers no explanation. DOC's investigator spoke with Ms. Elliott on March 16, but informed her – without reason – that he would not be able to "assign" the investigation "until after April." CP 118. It was not until Ms. Elliott followed up on April 5, 2010, that the investigator responded that he intended to "come down" on April 16, again with no explanation for the delay. CP 119.

Contrary to DOC's efforts to blame the delay on Ms. Elliott's "fail[ure] to sign the proper paperwork," that alleged failure had nothing to do with any scheduling issues. While the parties were attempting to

finalize scheduling of interviews, Ms. Elliott was providing DOC with the necessary paperwork. CP 121. Finally, DOC provides no explanation for why the investigation was not concluded until July 20, 2010, two months after the final interviews had taken place and more than five months after the initial report. CP 31, ¶ 16 & 67. That delay sent the clear message that DOC did not take the matter seriously. Like Smith v. St. Louis University, 109 F.3d 1261, 1265 (8th Cir. 1997), abrogated on other grounds by, Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011), this unexplained delay is evidence of DOC's unreasonable response to Ms. Elliott's reports.

D. Vickie Elliott's Negligent Supervision Claim Should Also Go to the Jury.

DOC contends that Ms. Elliott's negligent supervision claim was properly dismissed because, according to DOC, it is based on the "same facts" as her discrimination and retaliation claims and therefore barred by Francom v. Costco Wholesale Corp., 98 Wn. App. 845 (2000). Resp. Br. at 41. DOC ignores the fact that the negligent supervision claim is an alternative claim to Ms. Elliott's WLAD claims that is based on distinct facts, not a redundant claim, and thus it is not barred by Francom.

It is axiomatic that parties may plead and prove alternative – even inconsistent – claims. CR 8. The only "apparent limit" on pleading and proving inconsistent theories is the duty of good faith imposed by CR 11,

and a party must be permitted to "submit those inconsistent [theories] to the jury if justified by the totality of the evidence." Amrine v. Murray, 28 Wn. App. 650, 654-55 (1981).

Francom – as read by DOC – is simply inapplicable to this case and this Court should decline DOC's invitation to misapply it. Francom acknowledges that Ms. Elliott's negligent supervision claim may proceed as an alternative claim. 98 Wn. App. at 864-65 ("[w]hen a plaintiff alleges that non-discriminatory conduct caused separate emotional injuries, he or she may maintain a separate claim for negligent infliction of emotional distress."). Contrary to DOC's contention, this Court has explicitly recognized that an alternative theory of negligent supervision may coexist with a discrimination claim. Herried v. Pierce County Public Transp. Ben. Authority Corp., 90 Wn. App. 468, 475-74 (1998) (separately analyzing negligent supervision claims based on discriminatory and nondiscriminatory acts). This Division of the Court of Appeals is not alone in that recognition. See also, Chea v. Men's Warehouse, Inc., 85 Wn. App. 405, 413-14 (1997), rev. den., 134 Wn.2d 1002 (1998) (holding that a negligent infliction of emotional distress claim may coexist with an employment discrimination claim where the basis for the negligent infliction of emotional distress claim are the nondiscriminatory acts by the employer).

Here, the negligent supervision claim is in place in the event that a jury (or Court) were to decide – as DOC urges – that Ms. Smith's harassment

of Ms. Elliott was not motivated by race or if – again as DOC insists – Ms. Smith's final tripping and the resulting constructive discharge is not imputed to DOC under agency principles. The negligent supervision claim is thus not based on the same facts as the WLAD discrimination or retaliation claims because an essential factual element of those claims – discriminatory motive or agency liability – is missing. See Nygren v. AT&T Wireless Services, Inc., Case No. C03-3928, 2005 WL 1244976 (W.D. Wash. 2005) (holding that, under Francom, a negligent supervision claim could proceed where the plaintiff "mistakenly believed that his allegations made out a claim of discrimination" which the court had previously dismissed).

DOC also contends that the negligent supervision claim is barred by the Industrial Insurance Act ("IIA"). However, the IIA does not abolish a common-law right of action without providing a substitute remedy. Goodman v. Boeing Company, 127 Wn.2d 401, 407 (1995). The injuries that Ms. Elliott seeks to vindicate are separate and distinct from any physical injuries caused by Debra Smith's actions; one is the ongoing emotional injury caused by Ms. Smith's harassment and continued exposure to her in the DOC kitchen, the other is the emotional and economic damages arising for the loss of a valuable job that was the ultimate result of the final tripping incident.

As to the emotional harm suffered by Ms. Elliott, the negligent supervision claim takes DOC at its word – that the conflict between Ms.

Smith and Ms. Elliott was nothing more than "personnel and personality problems" resulting from a "falling out" between coworkers. Resp. Br. at 20 & 35. As such, those injuries are specifically excluded from the coverage of the IIA as an "occupational disease." WAC 296-14-300(1)(d). Those emotional injuries – Ms. Elliott's distress and fear – also are not an "industrial accident" because they are not the result of a "single traumatic event," but rather they are the cumulative result of Ms. Smith's repeated harassment and the continued exposure to her in the Larch kitchen until DOC finally placed Ms. Smith on administrative leave. RCW 51.08.100; WAC 296-14-300(2); Rothwell v. Nine Mile Falls Schools Dist., 149 Wn. App. 771, 779-82 (2009). Emotional injuries arising from a negligence claim, where they are separate from the physical injury, are simply not subject to the IIA exclusivity bar. Goodman, 127 Wn.2d at 407; see also, Chea, 85 Wn. App. at 414 ("The IIA does not compensate for negligent infliction of emotional distress claims arising from workplace harassment, including verbal harassment . . . so such claims are not barred by the IIA exclusivity provisions.").

Likewise, the loss of Ms. Elliott's job at DOC was a separate and distinct harm from the physical injuries that resulted from the tripping by Ms. Smith. It was that physical assault combined with DOC's negligent handling of the situation, including its refusal to separate the two women even *after* the tripping incident, that forced Ms. Elliott from her job. Such

harm is likewise separate and distinct from the physical injury caused by the tripping and thus is not barred by the IIA. Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 573-74 (1987), overruled on other grounds, Phillips v. City of Seattle, 111 Wn.2d 903 (1989). Accordingly, Ms. Elliott's Negligent Supervision claim should also proceed to a jury.

III. CONCLUSION.

For the reasons set forth above and in Ms. Elliott's Opening Brief, the trial court erred in granting DOC's Motion for Summary Judgment. Accordingly, this Court should reverse that ruling and remand this case to the trial court to allow Ms. Elliott to present her claims to a jury of her peers.

Respectfully submitted this 5th day of August, 2015.

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Appendix A to Reply Brief

DOC filed extensive objections to evidence offered by Ms. Elliott in support of her opposition to DOC's Motion for Summary Judgment. Supplemental Clerk's papers CP 796-808. DOC renews those objections before this Court. Resp. Br. at Despite DOC's protests to the contrary, the evidence is admissible for a variety of reasons. As to DOC's various hearsay objections, the statements are either not offered for the truth of the matter asserted but for some other purpose and thus are, by definition, not hearsay. ER 801(c); State v. Lillard, 122 Wn. App. 422, 436-37 (2004), rev. den., 154 Wn.2d 1002 (2005). Alternatively they are statements made by a DOC employee about a matter within the scope of employment and thus constitute an admission by a party opponent. ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006). Additionally, much of the evidence that DOC objects to is legitimate lay opinion testimony and evidence of other acts of discrimination at Larch that is admissible under Loeffelholz v. University of Washington, 175 Wn.2d 264 (2012) to evaluate Ms. Elliott's hostile work environment claim or as evidence that DOC failed to adequately remedy systemic racism at Larch under Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009) and Theno v. Tonganoxi Unified School Dist. No. 464, 377 F.Supp.2d 952 (D. Kan. 2005). The attached chart provides each of the DOC's various objections, with Ms. Elliott's corresponding response in brackets to allow this Court to determine whether it should be considered.

Exhibit	**Objection**
1 (Elliott Dep.)	**25:22-26:14; 27:8-14** —Hearsay ("I was told that by Veronica.") [Offered to show effect on listener – i.e., belief that reassignment was possible, thus not hearsay under ER 801(c).]

	28:2-18—Foundation (as to Collective Bargaining Agreement terms and superintendent's application of CBA); Competency (witness is not qualified to testify about the terms of the CBA) [Lay Opinion under ER 701 based on personal experience.] **28:20-29:17; 34:7-40:16**—Relevance (unrelated claims dating back to 2005; barred by settlement agreement). [Background Evidence of hostile work environment admissible under Loeffelholz, v. University of Washington, 175 Wn.2d 264 (2012).] **111:20-24**—Hearsay (statement of co-worker) [Not relied on by Plaintiff] **167:3-168:24**—Hearsay; relevance (statements allegedly made regarding a co-worker being hired at Larch); foundation (as to DOC's rationale for making hiring decision) [Admission Party Opponent, ER 801(d)(2)(iv) – by employee about matter in employment with authority to speak on matter in question; Lay opinion from experience ER 701]
2 (10/12/10 letter)	**Statement of AAG Gary Andrews from 2008, last paragraph—** Relevance, Hearsay, ER 408 (settlement discussion) [Admission - Statement by employee about matter in employment with authority to speak on matter in question. ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006); Shows Defendant acknowledged obligation to protect Vickie Elliott, thus admissible to show duty in negligent supervision claim; not part of

	settlement discussions or terms.]
3 (Smith Dep.)	**11:4-13:7**—Relevance (Smith's father's views are irrelevant), ER 403 (unduly prejudicial); ER 404 (improper character evidence; Plaintiff is attempting to impute father's character to Smith) [Based on the evidence of Ms. Smith's upbringing, in the context of other actions as described in Reply, a reasonable juror could conclude that Smith was motivated by race – Minimal relevance standard under ER 401 "any tendency to make a fact more or less probable;" no unfair prejudice, not evidence of character.] **51:13-17**—Foundation (as to what DOC considered in its investigation) [Not relied on by Ms. Elliott.] **110:1-15**—Relevance (Smith's views on homosexuals); ER 403 (unduly prejudicial); ER 404 (improper character evidence; Plaintiff is attempting to allege Smith is racist because she does not support a homosexual "lifestyle") [As with evidence of upbringing, this expression of prejudice against one group satisfies minimal relevance standard to show she is discriminatorily motivated. ER 401 "any tendency to make a fact more or less probable"] **111:12-21**—Hearsay (alleged Vernell statement to Smith) [Vernell's statement is an admission of a party opponent. ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006).] **112:12-15** —Improper; lay witness asked to offer legal opinion. [Not relied on by Ms. Elliott for anything]

4 (TRO Hearing)	**40:9-42:21**—Relevance (commissioner ruling on TRO hearing); Improper to the extent Plaintiff attempts to apply collateral estoppel (DOC not a party to prior action, involved different issues; and unfair to impose commissioner's findings in this case. *See Christensen v. Grant Co. Hosp. Dist. No. 1,* 152 Wn.2d 299, 307, 96 P.3d 957 (2004). [DOC opened the door to this evidence as it was initially offered by DOC. CP 139-40, ¶ 3 & CP 191-201. It is evidence the Court may consider under ER 401]
5 (Humphries Dep.)	**23:14-23; 26:1-5 5**— Improper hypothetical posed to non-expert witness; improper lay opinion (ER 701); speculative; foundation (hypothetical posed omits critical undisputed facts) [Not relied on by Ms. Elliott] **26:15-29:6** — Relevance (Humphries perceived discrimination has nothing to do with Elliott and Smith); Foundation (it's kind of like [based] on rumors"); Argumentative [Evidence of bias against other members of Plaintiff's protected class "especially relevant." McDonnell Douglas, 411 U.S. 792 (1973); witness testified that the discrimination was rumors circulated about him to make him look bad, not that it was based on rumors. CP 368, lns. 15-23.] **29:24-30:12** — Foundation (as to how DOC conducts investigations) [Lay opinion under ER 701 based on his own experiences and perceptions of investigations of his complaints.] **30:13-25** —Hearsay ("Yes, I heard that"); Foundation (Humphries' testimony regarding restraining order based on hearsay)

	[Not relied on by Ms. Elliott]
11 (Harris Dep.)	**46:7-25**—Relevance (testimony about alleged issue with co-worker that has nothing to do with Elliott or Smith) [Under ER 401 meets minimal relevance standard, —goes to show that Larch has an unaddressed problem with racism. Patterson v. Hudson Area Schools, 551 F.3d 438 (6th Cir. 2009) and Theno v. Tonganoxi Unified School Dist. No. 464, 377 F.Supp.2d 952 (D. Kan. 2005).] **49:2-50:25; 52:1-25**—Relevance (testimony about other workers' issues involving discrimination allegations); Foundation (witness admitted she had no first-hand knowledge); Hearsay (witness testifying about statements from other workers) [Under ER 401, meets minimal relevance standard, —goes to show that Larch has an unaddressed problem with racism. Theno & Patterson. Not hearsay because offered to show effect on listener, ER 801(c); based on personal observation of conversation.] **89:3-92:13**—Leading (e.g. 91:7-12); Improper hypothetical posed to non-expert witness; improper lay opinion (ER 701); speculative; foundation (hypothetical posed omits critical undisputed facts); hypothetical assumes facts not in evidence; foundation (declarant lacks personal knowledge) [Proper lay opinion under 701 about how witness, as a reasonable African American, would perceive being kicked in the rear by a white person as offensive and carrying a racial component.]
19 (Clark Dep.)	**10:13-15:25**—Relevance (witness testifying about alleged events 16 years ago, well before Elliott or Smith even worked at Larch);

	Foundation (testimony about other employees' motivations for leaving Larch); Foundation (testimony about DOC placing "problem managers" at Larch and other DOC alleged decisions of which witness has no first-hand knowledge) [Under ER 401, meets minimal relevance standard, —goes to show that Larch's unaddressed problem with racism has a long, extensive, and ugly history. Theno & Patterson.] **23:1-28:25**—Relevance (witnesses' own lawsuit that has nothing to do with this case); Foundation (testimony about DOC investigations of which witness has no first-hand knowledge); Foundation (testimony about how Elliott's complaint was handled); Relevance (testimony about "workplace violence" claim witness filed against multiple DOC workers, including Olympia employees who have no contact with Clark) [Under ER 401, meets minimal relevance standard, —goes to show that Larch's longstanding problem with racism is fueled by its refusal to adequately address the discrimination but rather treat the victim as the problem. Theno & Patterson.] **33:1-36:17**—Hearsay (Elliott's supposed statements to Clark and Clark's alleged statements to Elliott); Hearsay-within-hearsay (Caldwell's supposed statements to Elliott which were supposedly relayed to Clark; allegation barred by settlement agreement); Relevance (testimony about Elliott's dispute with Caldwell, which has nothing to do with this case; allegation barred by settlement agreement); Hearsay (witness admits he is providing hearsay at 34:15) [Admission - Statement by employee about matter in employment with authority to speak

	on matter in question. ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006) - (Caldwell); Plaintiff's own statements offered to corroborate her testimony, not hearsay under ER 801(d)(1)(ii); background evidence of Vickie's claims, Loefholtz.] **38:5-40:25**—Relevance (testimony about Elliott's dispute with Caldwell, which has nothing to do with this case; allegation barred by settlement agreement); Hearsay (alleged statement from Allen and alleged statements to Vernell and others); Leading (38:21-39:1); Hearsay (Caldwell statements to Clark) [Not related to dispute with Elliott- relevant to show that Caldwell privately acknowledged existence of racism at Larch, contrary to his testimony that it had been taken care of; Admission– Statement by employee about matter in employment with authority to speak on matter in question. ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006) - (Caldwell)] **78:1-80:25**—Foundation (Clark testifying about Elliott's restraining order, an issue of which he has no personal knowledge); Hearsay (alleged discussion with Vernell regarding shift); Foundation (no basis to support Clark's claim that his union allows management to violate Collective Bargaining Rights by unilaterally changing shifts); Competency/Foundation (witness is not competent to testify regarding terms of the Collective Bargaining Agreement); Foundation (as to Elliott's "anxiety") [Clark was present at restraining order hearing as a witness for Vickie, Admission -Statement by employee about matter in employment with authority to speak on matter in question. ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006) (Vernell); Professional Opinion about application of CBA – Clark is a union shop steward; "anxiety" based on

	personal observation of Ms. Elliott.] **101:6-102:25**—Foundation (testimony regarding how DOC "creates an environment" for people to engage in, "racially charged" behavior); Non-responsive; Foundation (opinion about Smith's conduct toward Elliott) [Plaintiff only relies on testimony from line 19 on; based on knowledge of Smith incidents gained through assisting Elliott as her Union Rep; Lay opinion as to whether those actions are discriminatory.] **115:1-25**—Hearsay [Statement by Vickie Elliott offered to show her state of mind as declarant regarding ability to remain at Larch, not hearsay under ER 801(c)(2).]
20 (Stricker Dep.)	**16:5-18:25**—Leading; Foundation (no foundation for testimony about management's treatment of black employees; or that black leadership engages in "reverse racism"); Relevance (alleged treatment of employees who have nothing to do with this case); Foundation (testimony about DOC rationale for denying Sid Clark's flex schedule); Foundation (regarding the "union position" on various issues and as to the situation involving co-worker Borgaard in 2005; allegation barred by settlement agreement); Relevance (all testimony) [Testimony based on personal knowledge of incidents, observations as an employee of Larch and role as union shop steward; Relevant to establish Larch's failure to adequately address racism and its retaliatory treatment of those who stand up against discrimination. Theno & Patterson.] **27:1-33:25**— Foundation (witness has no competency to testify about staffing decisions or the terms of the Collective Bargaining

	Agreement); Hearsay-within-hearsay (statements from Vernell to Elliott); Triple Hearsay (statement about co-worker Clausen written statement which contains hearsay about a former Superintendent's statements, all of which have nothing to do with this case; allegation barred by settlement agreement); Relevance and Hearsay (testimony about complaint of Dorina Norman, who has not testified, and has nothing to do with this case); Foundation and relevance (issue of Clark receiving an award) [Testimony based on personal knowledge of incidents, observations as an employee of Larch and role as union shop steward; Admission - Statement by employee about matter in employment with authority to speak on matter in question; ER 801(d)(2)(iv); State v. Chambers, 134 Wn. App. 853 (2006)- (Dorina Norman authorized to report retaliation); may consider pre-settlement statements of Clausen under Loeffelholz because it demonstrates pattern of pitting employees against one another, making it more likely that Vernell's actions were intentional and retaliatory.] **43:1-25**—Foundation (there is no foundation for Stricker's statement that he "possibly" but "can't say for sure" whether Smith made a racial joke; he admitted he could not even recall the content of the joke) [Personal knowledge, certain that joke wasn't made by "somebody else," equivocation goes to weight, not admissibility.] **61:11-19**— Foundation (as witness acknowledged, he could not say for sure whether anyone offered to switch shifts with Elliott) [Personal knowledge, witness testified that "off memory, I believe that there was one member that had volunteered" to replace "either Ms.

	Elliott or Ms. Smith."]
21 (Hutchinson Dep.)	The entire deposition is inadmissible. This witness has no personal knowledge about anything relevant to this case. He admitted to having no personal knowledge of issues pertaining to prior investigations following complaints by Elliott and in any event these prior investigations have nothing to do with this case. His testimony regarding these investigations appears to be based entirely on hearsay statements of Elliott or other workers. He testified as to Plaintiff's allegations barred by settlement agreement [Personal knowledge from statements made by Thompson and Vickie Elliott as well as personal observations of Sgt. Thompson; Loeffelholz]
23 (Claussen statement)	Hearsay (there is no sworn statement by the declarant) Hearsay-within-hearsay (contains hearsay statement from former Superintendent) Relevance (has nothing to do with this case) Allegation barred by settlement agreement [Business Record – Report of DOC employee; Admission - Claussen authorized to make report ER 801(d)(2)(iv); Demonstrates pattern of pitting employees against one another; Loeffelholz]
24 (medical record)	Hearsay; foundation; relevance [Business Record to corroborate Ms. Elliott's testimony about injury resulting from final tripping incident.]
25 (minutes from a 2008 meeting and emails)	Hearsay Relevance [Confirmed as agenda of meeting, CP 642, shows that NAACP raised issues of racism, including instances specifically suffered by Vickie Elliott, and that Larch & DOC still

	failed to adequately address racism, that failure to deal with the issue led directly to Vickie's experience. Patterson & Theno]
26 (Wright Dep.)	**21:1-9** — Relevance [DOC on notice of "blatant discrimination" at Larch as early as 2007-08 based on reports of employees that Wright testifies about. Patterson & Theno] **25:14-28:16** — Leading; Improper hypothetical posed to non-expert witness; improper lay opinion (ER 701); speculative; foundation (hypothetical posed omits critical undisputed facts); hypothetical assumes facts not in evidence; foundation (declarant lacks personal knowledge) [Proper lay opinion under 701 because based on his experiences as an African American that Ms. Smith's actions were racist and why Ms. Elliott would be concerned as an African American employee.] **28:17-32:25** —Relevance; foundation [Relevant to show that DOC management is willfully blind to the effect of discrimination at Larch. Patterson & Theno; is witness's opinion on issue based on his experience.] **34.1-38:25** — Foundation (witness is being asked about hearsay statement of which he did not have personal knowledge); Relevance; Hearsay [Witness authenticates seeing Ex. 305 before and recalls the issues were those discussed at NAACP meeting; relevant to show DOC on notice of problem of racism at Larch. Patterson & Theno] **56:1-19**—Relevance (witness is being asked about an email that addresses issues that were settled)

	[Relevant to show DOC on notice of problem of racism at Larch. Loeffelholz, Patterson & Theno]
27 (NAACP agenda)	Hearsay Foundation Relevance [Confirmed as agenda of meeting, CP 637, shows that NAACP raised issues of racism, including instances specifically suffered by Vickie Elliott, and that Larch & DOC still failed to adequately address racism, that failure to deal with the issue led directly to Vickie's experience.]
28 (Caldwell Dep.)	The entire deposition is inadmissible. It is irrelevant, there is no foundation, and vague as to timeframe. Contains allegations barred by settlement agreement [All testimony is based on Mr. Caldwell's own experience and opinions as a CPM; relevant to show that management at Larch took the official view that racism was a thing of the past, which led to their failure to adequately address racism and correct it in any meaningful way; , Patterson & Theno. Testimony doesn't relate to any of Vickie's claims.]
29 (Francis Dep.)	The entire deposition is inadmissible.The witness is testifying to irrelevant issues, such as prior claims by Plaintiff which were settled. It contains hearsay statements of Plaintiff. There is no foundation for his opinions regarding Norm Caldwell's "philosophy." The testimony about Sid Clark has nothing to do with this case. There is no foundation for the witness's views on "retaliation" against African-Americans. Contains allegations barred by settlement agreement. [Based on witness's experience as an employee and shop steward at Larch, testifies about

	instances involving Clark and others that show retaliatory practices, particularly when the victim is African-American. , Patterson & Theno]

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **APPELLANT'S REPLY BRIEF**, on the following parties:

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By e-mailing said document on the dated stated below.

DATED this 5th day of August, 2015.

s/ Matthew E. Malmsheimer
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